

1 INDEX OF PROCEEDINGS

2
3 April 20, 1999
4 (Afternoon Session)
5
6
7

8	WITNESS:	PAGE
9	RICHARD ALLAN CARCHMAN, Ph.D.	
10		
11	DIRECT EXAMINATION (Cont'd.)	
12	BY MR. HARDY.....	7733
13		
14	CROSS-EXAMINATION	
15	BY MR. WILNER.....	7740
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

7930

1
2 E X H I B I T S
3
4

5	EXHIBIT NUMBER	PAGE
6		
7	Exhibit Number 379 was marked for	
8	identification.....	7735
9	Exhibit Number 380 was marked for	
10	identification.....	7736
11	Exhibits Number 371 through 381 were admitted	
12	into evidence.....	7739
13	Exhibit Number 382 was marked for	
14	identification and admitted into evidence.....	7756
15	Exhibit Number 383 was marked for	
16	identification.....	7792
17	Exhibit Number 384 was marked for	
18	identification and admitted into evidence.....	7813
19	Exhibit Number 385 was marked for	
20	identification and admitted into evidence.....	7822
21	Exhibit Number 386 was marked for	
22	identification.....	7827
23		
24		
25		

7829

1 IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
2 FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

3 BOBBY NEWCOMB,
4
5 Plaintiff,

T.D.

6
7 R.J. REYNOLDS TOBACCO COMPANY, and
8 THE BROWN AND WILLIAMSON TOBACCO
9 COMPANY, as successor by merger to
10 THE AMERICAN TOBACCO COMPANY,
11
12 Defendants.

11
12
13 Before: The Honorable D'Army Bailey
14

15
16 TRANSCRIPT OF PROCEEDINGS

17
18 April 20, 1999
19 (Afternoon Session)
20

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7830

1

2 EDITH KARNEY, Individually, and
3 On behalf of the Estate of
4 JAMES WILEY KARNEY,
5 Plaintiffs,

- vs -

Case No. 89196-8

T.D.

6
7 PHILIP MORRIS, INC., and
8 PHILIP MORRIS COMPANIES, INC.,
9 Defendants.

9
10 RUBY SETTLE, Individually, and
11 On behalf of the Estate of
12 RAYMOND SETTLE,
13 Plaintiffs,

- vs -

Case No. 89226-8

T.D.

13
14 B.A.T. INDUSTRIES, PLC; BATUS HOLDINGS,
15 INC.; BROWN & WILLIAMSON TOBACCO
16 CORPORATION; BRITISH AMERICAN TOBACCO
17 COMPANY, L.T.D.,
18 Defendants.

T.D.

18 DENISE McDANIEL, Individually,
19 and On behalf of the Estate of
20 FLORENCE BRUCH,
21 Plaintiff,
- vs - Case No. 90832-8
22
23 BROWN AND WILLIAMSON TOBACCO
24 CORPORATION, and
25 PHILIP MORRIS, INC.,
Defendants.

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21
22
23
24
25
7833
1 (At 2:06 p.m., on the 20th day of
2 April, 1999, Court met, pursuant to adjournment,
3 when and where the following proceedings occurred,
4 to wit:)
5 (Out of the presence of the jury.)
6 THE COURT: All right. Lawyers, ready
7 for the jury?
8 MR. HARDY: Yes, Your Honor.
9 (Whereupon, the jury was seated in the
10 jury box.)
11 THE COURT: Thank you, ladies and
12 gentlemen.
13 Mr. Hardy, you may continue your direct
14 examination.
15 MR. HARDY: Thank you, Your Honor.
16
17 RICHARD ALLAN CARCHMAN, Ph.D.,
18 having been previously duly sworn by the Clerk to
19 tell the truth, the whole truth and nothing but
the
20 truth, returned to the witness stand and testified
21 as follows:
22 DIRECT EXAMINATION (Cont'd.)
23 BY MR. HARDY:
24 Q. Doctor, before we started talking about
25 the Accord I forgot to ask you, in connection with

the 1 the Next cigarette, when that product failed in
2 test market, did that end Philip Morris's search
3 for a way to make a denicotinized or a no-nicotine
4 cigarette?

5 A. No.

subject 6 Q. What is the company doing on that
7 now?

8 A. At the same time all these other efforts
9 were going on, including the supercritical
10 extraction, we had a group of molecular biologists
11 trying to and succeeded and patented a procedure
12 for genetically modifying tobacco to lower the
13 nicotine levels in the plant. That work is
14 currently continuing in the University of Virginia
15 in Charlottesville.

16 Q. I see. All right. Okay. Back to where
17 we were then. Did Philip Morris study the effects
18 upon or determine the effects upon the

constituents 19 in the smoke before it started test marketing
20 Accord?

21 A. Yes.

22 Q. All right. And I'm talking here, of
23 course, about benzopyrene and nitrosamines, that
24 sort of thing.

25 MR. HARDY: Okay. If you will put 379
7835

1 up?

marked 2 (Whereupon, Exhibit Number 379 was
3 for identification.)

4 Q. BY MR. HARDY: And I think you've got
5 that if you need it in your notebook, Doctor.
6 Would you explain this chart to the jury?

7 A. The chart is taken from a
8 presentation -- two presentations that were made,
9 one last year at the Society of Toxicology meeting
10 in Seattle, and one that was made to government
11 scientists in Washington, D.C. And this is just
12 meant to illustrate their work: 55 constituents
13 that were measured. And this is just to

illustrate 14 some of the changes that we see in the Accord with
15 regard to the chemistry, so this has been
16 presented.

17 Q. Excuse me. Is this "electrically heated
18 cigarette," that's the Accord?

19 A. Yes, sir.

one 20 Q. Okay. Well, just tell them what this
21 shows.

22 A. Compared to the reference cigarette that
23 we've talked about, there's a 96 percent reduction
24 in the benzoapyrene levels; a 99 percent reduction
25 in another polyaromatic hydrocarbon, the same

1 family as benzoapyrene; the volatile nitrosamines
2 that we talked about earlier, 93 to 99 percent
3 reduced; the tobacco-specific nitrosamines that we
4 talked about, 82 to 86 percent reduced; benzene,

and 5 98 percent reduced; phenol, 96 percent reduced;
smoke, 6 acetaldehyde, which is the major aldehyde in
this 7 is reduced 78 percent. Again, this is just
8 illustrative of the many things we examined in
9 product.
10 MR. HARDY: Okay. You want to put a
11 three -- whatever the next one -- I think it's
380, 12 yeah.
13 (Whereupon, Exhibit Number 380 was
marked 14 for identification.)
15 Q. BY MR. HARDY: Now, explain, please, to
16 the jury what this shows about your biologic
17 activity comparison of the Accord with the
18 commercial brands --
19 A. Now --
20 Q. -- conventional cigarettes?
21 A. This is -- now, the kind of data we get.
22 We've talked about these assays earlier. But if
23 you take the Accord product and look for
24 mutagenicity in the Ames test, there's a 97
percent 25 reduction in mutagenic activity. If you
7837
1 then -- which is a test tube examination.
2 Another test tube examination, looking
at 3 the ability of the smoke from the Accord to damage
4 animal cells, there's an 80 percent reduction.
And 5 then if you take animals and have them inhale the
6 smoke from Accord and look at the irritancy of
that 7 smoke in the respiratory tract of these
8 animals -- this would be 90 days of exposure, six
9 hours a day, seven days a week -- basically you
see 10 a 40 percent reduction in irritancy of this smoke
11 compared to the reference -- reference cigarette.
12 Q. Has Philip Morris -- you may have
already 13 answered this, but have they disclosed this data
to 14 the federal government?
15 A. This was actually presented in
Washington 16 to scientists of the federal agency. And I
17 presented this to the Department of Health in
18 Canada last year.
19 MR. HARDY: Go back to 379.
20 Q. BY MR. HARDY: How does this reduction
of 21 tobacco-specific nitrosamines in the Accord
22 cigarette compare to the Next cigarette, the one
23 that failed in the marketplace?
24 A. The Next cigarette has about twice as
25 much tobacco-specific nitrosamines as an Accord
7838
1 cigarette.

2 MR. HARDY: Okay. Back to 380 now.
3 Q. BY MR. HARDY: And these three
categories
4 of mutagenicity, cytotoxicity and in vivo
5 irritancy, how does the Next cigarette compare
with
6 Accord in those three areas of biologic activity?
7 A. The data I remember the best is Ames
8 mutagenicity, and the Next cigarette basically has
9 the same activity as the reference cigarette. So
10 the Accord cigarette -- If you were to put Accord
11 next to this denicotinized cigarette, Accord would
12 be 97 percent reduced in Ames activity. Next and
13 reference cigarette are indistinguishable in Ames
14 mutagenicity.
15 Q. Now, assuming that Accord does well in
16 test market, ends up being a brand manufactured by
17 Philip Morris, does that end the search for a
safer
18 cigarette?
19 A. Oh, no. I mean, the fact that it's out
20 on the test market by definition means there's a
21 lot of work still going on. And even beyond the
22 Accord-type product, there are other products
23 beyond Accord that we're examining that we believe
24 will have even better reductions in some of these
25 small constituents that we're seeing that we're
7839
1 seeing now and possibly smoke) even be able to
take
2 advantage of some new breakthroughs in material
3 sciences to maybe selectively remove benzopyrene,
4 for example. That work is still going on.
5 MR. HARDY: Sheriff, would you mind
6 getting the book from him?
7 I may have already done this. But in
8 case I haven't, I want to offer Exhibits 371
9 through 381 into evidence.
10 MR. WILNER: We don't care.
11 THE COURT: Without objection.
12 (Whereupon, Exhibits Number 371 through
13 381 were admitted into evidence.)
14 MR. HARDY: Thank you, sheriff.
15 Q. BY MR. HARDY: Doctor, do you have an
16 opinion based upon a reasonable degree of
17 scientific certainty as to whether Philip Morris
18 has manufactured its cigarettes, including
19 Marlboro, according to the best technology
20 available for those kinds of cigarettes?
21 A. I do.
22 Q. What is that opinion?
23 A. I believe they have manufactured it
using
24 the best available technologies.
25 MR. HARDY: Thank you very much.
7840
1 THE COURT: All right. At this time
2 we'll call on Mr. Wilner for cross-examination.
3 MR. WILNER: Yes, Your Honor. I'm
afraid
4 we have some books that I need to get back there,
5 so it may take me a few minutes.
6 Your Honor, may I have five minutes to

7 set up, please?
8 THE COURT: Well, since we just came in.
9 We'll just relax and give you the benefit while
you
10 set up.
11 MR. WILNER: Okay. May it please the
12 Court? Thank you.
13
14 CROSS-EXAMINATION
15 BY MR. WILNER:
16 Q. Is it Dr. Carchman?
17 A. Yes.
18 Q. I don't think we've met.
19 A. I don't believe we have.
20 Q. Pleasure to meet you.
21 A. Same here.
22 Q. You're -- When did you leave
23 Philip Morris?
24 A. February.
25 Q. You're fresh from testifying in Oregon?
7841
1 A. Yes, sir.
2 Q. How about California?
3 A. No, sir.
4 Q. Miami?
5 A. Yes, sir.
6 Q. This is before or after you left
7 Philip Morris?
8 A. After.
9 Q. Now, let me get this straight. You were
10 with the Medical College of Virginia for quite
some
from
11 time, which you said was kind of down the road
12 Philip Morris, right?
13 A. Yes.
14 Q. And it was a good move for you
15 financially to go with Philip Morris, wasn't it?
16 A. It was good, yes.
17 Q. To the tune of \$250,000 a year plus
18 \$100,000 of stock?
19 A. No. That's not accurate.
20 Q. That's not what you were paid at
21 Philip Morris?
22 A. That's not what I got paid when I went
to
23 work at Philip Morris, no.
24 Q. That was just in the later years?
25 A. After ten years.
7842
1 Q. Okay. But you were paid stock dividends
2 pretty regularly at Philip Morris?
3 A. No. I don't get stock dividends from
4 Philip Morris.
5 Q. You were paid in stock. You were given
6 stock options?
7 A. I have been given options, yes.
8 Q. Take them?
9 A. I still have the options.
10 Q. Meaning you got stock?
11 A. No. I have the options.
12 Q. You have the option to buy the stock?
13 A. At a certain price.

14 Q. Okay. So if the stock -- If the
15 Philip Morris stock goes up, you benefit? If it
16 goes down, you're hurt?
17 A. If it goes up, I benefit.
18 Q. And if it goes down, you don't get the
19 benefit of these stock options?
20 A. That's correct.
21 Q. Fair enough?
22 A. That's correct.
23 Q. So you have, in essence, a financial
24 interest in this litigation?
25 A. Absolutely.

7843

1 Q. Yes?
2 A. Absolutely, yes.
3 Q. Now, your contract with
4 Philip Morris -- You said you were consulting?
5 A. Yes.
6 Q. And you have a written contract with
7 them?
8 A. Yes.
9 Q. What does the written contract say about
10 revealing secrets?
11 A. Doesn't say anything about revealing.
12 Q. Nothing? You're not forbidden from
13 revealing secrets about Philip Morris?
14 A. There's nothing in the contract about
15 secrets, revealing or not revealing secrets.
16 Q. Are you supposed to make yourself
17 available when Philip Morris needs you to testify?
18 A. As I said earlier, I've provided in the
19 contract 100 days to the company in three areas.
20 Q. And what about before you retired? How
21 many days of litigation did you do?
22 A. On a percentage basis, just looking at
23 the last two years? Maybe 10 percent.
24 Q. Excuse me.
25 THE COURT: Doctor, if you would, pull

7844

1 that mike up.
2 THE WITNESS: Sorry.
3 Q. BY MR. WILNER: And, Dr. Carchman, is it
4 your intention now that this arrangement with
5 Philip Morris is going to continue in the
6 indefinite future?
7 A. No. My contract is for a year and a
8 half.
9 Q. And then could it be renewed?
10 A. It's possible.
11 Q. Now, let me see if we can agree on a few
12 things. Did you -- I made some notes when you
were
13 testifying. I want to see if I get it straight
14 here. You testified that Philip Morris and I
guess
15 all the other scientists that are working on this
16 still have not found out how cigarettes or the
17 constituents in cigarettes cause lung cancer,
18 right?
19 A. Yes.
20 Q. Now, before we discuss that in detail,
do
21 you agree, sir, that the knowledge of the exact

22 mechanism has never been required to protect the
23 public?
24 A. That's correct.
25 Q. Are you aware of who John Snow was, the
7845

1 physician in London --

2 A. Yes.

3 Q. -- in the mid-1800s?

4 A. Yes.

5 Q. You know how he protected the public
6 against cholera 30 years, 40 years before anyone
7 had any idea what caused it?

8 A. I know the story, yes.

9 Q. How did John Snow protect the public,
10 although they knew nothing about the microorganism
11 that caused cholera?

12 A. He basically restricted which water
13 source that people were using.

14 Q. He found that the cholera was occurring
15 around a particular pump in London called the

Broad

16 Street pump, right?

17 A. I believe so, yes.

18 Q. And although they didn't have the
19 foggiest notion --

20 MR. HARDY: Excuse me, Your Honor. I
21 think this is argumentative. This is more proper
22 for a closing argument. But the analogy itself
23 amounts to argument. Object to it on that basis.

24 THE COURT: Sustained.

25 Q. BY MR. WILNER: Doctor, tell us then in
7846

of
the

1 your own words. I was -- You were in the middle

2 answering what -- by what methods to illustrate

3 question or the principle that public health does
4 not need to await the exact mechanism. Tell us
5 again or tell us -- Since I was in the middle of
6 trying to explain, tell us what John Snow did.

7 MR. HARDY: Again, I object, Your Honor,
8 for the same reason. Just ask him -- well --

9 THE COURT: Well, I'll give him just a
10 brief amount of latitude just by way of example

and

11 then urge him to move on.

12 THE WITNESS: Could you repeat the
13 question, please?

14 Q. BY MR. WILNER: Yeah. Tell us what
15 John Snow did.

16 A. He basically recommended that people not
17 use this fountain and use another source of water.
18 And the cholera problem sort of took care of
19 itself.

he?

20 Q. He took a handle off the pump, didn't

21 A. Yes.

22 Q. In the cigarette epidemic, sir, what's
23 the handle?

24 A. I'm not sure I understand the question.

25 Q. Does Philip Morris understand what the
7847

1 pump is and what the handle is?

I

2 A. I think when I was asked by you whether
3 agree with the public health position, I said I
4 did. And there are a number of reasons why I said
5 that. And the level of proof and exactly the
6 example you used is, I think, in some respects a
7 meaningful answer. The public health community
8 today, not several hundred years ago, but today,
9 basically has taken the position that they don't
10 have to cross every "T" and dot every "I," and
11 that's fine. I don't think I have a problem with
12 that, nor do I think Philip Morris has a problem
13 with it.

though

14 The analogy between the water and
15 cholera, I think, is interesting but a
16 cross-oversimplification of the issue. The only
17 thing that causes cholera is the cholera bacteria,
18 the cholera microorganism. And I think that

19 cigarette smoking in the United States is the
20 largest single risk factor for lung cancer, it
21 clearly is not the only one. But it is the
22 largest. And in that sense the public health
23 community is justified in terms of what it says in
24 the warning labels that exist on the product.

public

25 Q. Well, you answered in terms of the

7848

1 health community. I asked you in terms of
2 Philip Morris. Aren't you speaking for
3 Philip Morris?

4 A. Yes, I am.

5 Q. All right. So my question is more
6 directed towards Philip Morris. Well, let me back
7 up then. Does Philip Morris feel that its
8 customers are -- that it has a responsibility to
9 its customers?

10 A. Absolutely.

11 Q. For the safety and health of its
12 customers?

13 A. Yes, sir.

14 Q. Does Philip Morris delegate that
15 responsibility to the public health community?

16 A. No. The public health community is part
17 of this entire situation. It always has been, and
18 I hope it will continue to be.

19 Q. Does the public health community
20 manufacture cigarettes?

21 A. No.

22 Q. Does the public health community profit
23 from the sale of cigarettes?

24 A. I'm not qualified to answer that
25 question. I don't know.

7849

1 Q. You don't know?

2 A. I don't know.

3 Q. Okay. Now, if Philip Morris has a
4 responsibility to the public or to the health of
5 its consumers, then my question was directed
6 specifically to Philip Morris.

7 Does Philip Morris recognize or does it
8 not recognize what a primary source of lung cancer
9 in the United States is?

10 A. It recognizes that cigarette smoking is,
11 as I've said, a risk factor, the largest single
12 risk factor identified for lung cancer in the
13 United States.

14 Q. And I guess you answered me with a
15 different word. You said it was a risk factor.
16 I'm asking you what the number one cause of lung
17 cancer in the United States is. Does Philip
Morris
18 now agree or disagree with or does Philip Morris
19 know?

20 A. I think, as I said yesterday, I
21 don't -- I can't tell you how many people have
died
22 in the United States from lung cancer due to
23 smoking. I can't give you the names of those
24 people either. All I can tell you is that
25 cigarette smoking is a risk factor, the largest
7850
1 single risk factor for lung cancer in the United
2 States.

3 Q. Well, does it make a difference to
4 Philip Morris whether it's a cause or a risk
5 factor?

6 A. Does it make a difference? I'm not sure
7 I understand your question.

8 Q. Well, let me start at a little -- with a
9 little history and see if you and I agree.

10 Prior to testifying here, you had -- I
11 think you said you were able to look at the
12 historical documents from inside Philip Morris or
13 certain of them anyway.

14 A. I may have. I probably said something
15 like that, yes.

16 Q. Well, were you --

17 A. I've looked at scientific documents
18 within Philip Morris, yes.

19 Q. Were you given free reign or not?

20 A. I was given free reign.

21 Q. Are you aware that Philip Morris has
made
22 available to the public a large collection of its
23 internal documents?

24 A. Yes, I am.

25 Q. How did you become aware of that?
7851
1 A. I read it in the newspaper.

2 Q. You mean nobody at Philip Morris told
3 you?

4 A. Yes. People at Philip Morris, but I
read
5 it first in the newspaper.

6 Q. Well, then did you inquire from
7 Philip Morris which documents had become
available?
8 A. I believe I had spoke -- I did speak to
9 the number of people about that. And I actually,
10 several weeks ago, asked for an update as to both
11 what's been turned over and the number of pages
12 that have been turned over. So, yes.

13 Q. Turned over to where?

14 A. To the Minnesota depository.

15 Q. Which you understand is a public source?

16 A. Yes, sir.
17 Q. And made available on the Internet?
18 A. Yes, sir.
19 Q. Are the documents made available on the
20 Internet?
21 A. Yes, sir.
22 Q. Have you gone on the Internet to do
23 research of these documents?
24 A. I haven't personally, but I've had some
25 colleagues who have.

7852

1 Q. And you say you had some colleagues; you
2 mean, from Philip Morris?
3 A. Yes.
4 Q. And they -- they -- Who are you talking
5 about?
6 A. Some of my -- when I was in R&D.
7 Q. They would actually go on and consult

the

8 Internet to see what some of these historical
9 documents said?
10 A. Yes, sir.
11 Q. So have you looked at the historical
12 documents with any kind of plan?
13 A. Plan?
14 Q. Yeah. I mean, have you looked at them
15 systematically, like by date or who they were
16 authored by or those kinds of things?
17 A. When I first came to the company I

looked

the

18 in a systematic way at the documents in R&D and
19 documents in INBIFO.
20 Q. Okay. And when -- You said the word
21 "R&D." You mean research and development,
22 something like that?
23 A. Yes, sir.
24 Q. So you learned who the major players

were

25 in research and development over the years in

7853

1 Philip Morris, right?
2 A. I learned who the people were that were
3 doing the work and putting together the business.
4 Some of them were major. Some of them were just
5 the people who do the work every single day.
6 Q. Helmut Wakeham, who is that?
7 A. He's a retired research and development
8 vice president. He ran R&D for -- research and
9 development for a number of years.
10 Q. And when you say "he ran R&D," he was
11 really the man in R&D at Philip Morris for a long
12 time?
13 A. That's what the head of R&D does, yes.
14 Q. Okay. And, in fact, Helmut Wakeham
15 authored many of the historical documents that you
16 had a chance to look at, right?
17 A. He authored a number -- a number of
18 documents that I have read and actually have

relied

19 upon for some of my opinions, yes.
20 Q. Okay. Now, did Helmut Wakeham say in
21 1961 --

22 MR. HARDY: Excuse me. Wait. Wait. If
23 you're going to refer to a document, I would like
24 to know what it is or see it before you start
25 reading or quoting from it.

7854

1 MR. WILNER: First I'm going to ask him
a question.

2 MR. HARDY: Your Honor, if he proposes
to ask him a question based on something a document
3 says, I think I'm entitled to see the document
4 before he does that.

5 THE COURT: I agree.

6 MR. WILNER: Your Honor, I would like to
7 show the document to the witness as well. Might I
8 do that?

9 THE COURT: Sheriff.

10 MR. HARDY: The only thing, I don't

think

11 we have any objection if it's nonredacted.

12 MR. WILNER: It is.

13 MR. HARDY: It's a clean copy?

14 MR. WILNER: Yeah.

15 Thank you, Sheriff.

16 THE WITNESS: Thank you.

17 Q. BY MR. WILNER: Have you seen that
18 document?

19 A. I believe so, yes.

20 Q. And is that Helmut Wakeham the same
21 Helmut Wakeham that we talked about before?

22 A. His name is on this as presenting this
23 document to a media in New York in November of

7855

1 1961. It's the same Dr. Wakeham we were referring
2 to earlier, yes.

3 Q. Okay. Now, did Helmut Wakeham say in
4 1961 that there were carcinogens in the product,
5 and he didn't know or there was no way to remove
6 them?

7 A. Can you point me to that?

8 Q. Page 20.

9 A. Well, this -- this is not numbered, a
10 number that I can see.

11 Q. I think you'll find it -- Look at the
12 Bates stamp. I think you'll find 442.
13 Find it?

14 A. Almost there. The title is?

15 Q. "Introduction of Carcinogens in Smoke."

16 A. Yes. I'm there. Thank you.

17 Q. All right.

18 A. Uh-huh.

19 MR. WILNER: Your Honor, we move it in,
20 next number.

21 THE COURT: Any objection?

22 MR. HARDY: No objection, as long as

it's

23 a complete copy, Your Honor. I have some

questions

24 about that because I have a different page number
25 than what Mr. Wilner was talking about. But

7856

1 provided we're dealing with a complete copy of the

2 document, Philip Morris has no objection to its
3 admission. I do reserve the right to compare a
4 complete copy with the particular one that
5 Mr. Wilner is using.
6 THE COURT: Very well. It will be
7 marked.
8 THE SHERIFF: Are we marking just these
9 pages?
10 THE COURT: No. We're marking the whole
11 thing.
12 (Whereupon, Exhibit Number 382 was
marked
13 for identification and admitted into evidence.)
14 Q. BY MR. WILNER: All right.
15 A. Yes, sir.
16 Q. Is this what we're looking at?
17 A. Yes, sir.
18 Q. And this is what Mr. Wakeham said in
19 1961: To achieve -- "Production of carcinogens in
20 smoke. To achieve this objective we will require
a
21 major research effort because carcinogens are
found
22 in particularly every class of compound in smoke.
23 This fact prohibits complete solution of the
24 problem by eliminating one or two classes of
25 compounds. The best we can hope for is to reduce
a

7857

1 particularly bad class, i.e., the polynuclear
2 hydrocarbons or phenols."
3 Then it goes on to say: "Present
4 technology does not permit selective filtration.
5 Flavor substances and carcinogenic substances come
6 from the same classes in many instances. And many
7 pyrolysis products have multiple precursors in
8 tobacco." Do you remember that?
9 A. Yes, sir.
10 Q. All right. Is it a fair statement that
11 he said in 1961 he acknowledges there were
12 carcinogens in the products and said the
technology
13 was not sufficient to get them out?
14 A. That's what was known in the public
15 literature. That was known to the company as
well.
16 Q. Well, you went beyond my question.
17 A. I'm sorry.
18 Q. You started to talk about the public
19 literature. Let me focus on one thing at a time
or
20 we'll never get done. But all I said was, does
21 this fairly represent your understanding of what
22 was inside Philip Morris research and development?
23 A. Yes, sir.
24 Q. Okay. Now, who was Hugh Cullman?
25 A. Hugh Cullman was an executive at

7858

1 Philip Morris.
2 Q. Now, did -- was it true that in 1962
3 Mr. Cullman was worried about the chemical
4 constituents in smoke?
5 A. He may have been. I don't know.

6 Q. Well, based on all your review of the
7 documents of Philip Morris, was the company
worried
8 after receiving Helmut Wakeham's 1961 report that
9 there were carcinogens in the smoke that they
10 couldn't remove?
11 A. I believe, in reading this, this was a
12 document that was intended to raise this to the
13 highest possible level in the company. And, you
14 bet, I would have been worried, concerned as well.
15 Q. So internally Philip Morris would have
16 been worried about the safety of its products as
of
17 19, say, 61?
18 A. Reading this, I believe they were.
19 Q. Okay. Now, do you have -- Do you know
20 what the public position of Philip Morris was with
21 respect to the safety of its products in that time
22 period?
23 A. 1961? No, I don't.
24 Q. Okay. Now, as of 1963, were the
25 tobacco-specific nitrosamines recognized as being
7859
1 important by Philip Morris?
2 A. 1963? I'm not sure there was even a
3 method for -- for truly quantifying -- truly
4 quantifying.
5 Q. Well, I didn't ask you if there was a
6 method for truly quantifying them. I asked you
7 whether the company might be worried about them
and
8 think they were important?
9 A. In 1963 I don't know specifically
whether
10 they knew about them or not.
11 MR. HARDY: Okay. Let me hand you this
12 document.
13 (Discussion off the record.)
14 MR. HARDY: All right, then. I'll need
a
15 moment to take a look at this.
16 MR. WILNER: Okay. No problem.
17 MR. HARDY: Mr. Wilner, is that supposed
18 to be part of the document?
19 (Discussion off the record.)
20 MR. WILNER: Sheriff? Thank you, sir.
21 Q. BY MR. WILNER: Dr. Carchman, I've shown
22 you a document entitled "Nitrosamines." Do you
see
23 that?
24 A. Yes, sir.
25 Q. Have you seen this document before?
7860
1 A. No, I haven't.
2 Q. Have you looked in the files of
3 Philip Morris to determine whether this document
4 occurs?
5 A. I've looked through the files of
6 Philip Morris, yes. But I don't recall seeing
this
7 one. But forgive me, Mr. Wilner. You said
8 tobacco-specific nitrosamines. Could you point me
9 to where it says that?

10 Q. Well, let's go a step at a time. Let's
11 just talk about nitrosamines. Are you aware that
12 the company would believe that nitrosamines in
13 general --
14 MR. HARDY: Excuse me just a minute. I
15 object to anything concerning the content of this
16 document since the witness says he hasn't seen it.
17 MR. WILNER: Well, let me go a step at a
18 time. I don't know how Counsel knows what I'm
19 asking about, other than if I can complete my
20 question.
21 THE COURT: Well, I think that his
22 objection is as to foundation with regard to
23 inquiries pertinent to the content of the
argument,
24 to the extent that the content is clearly revealed
25 in the inquiry. So I sustain the objection.

7861

1 Q. BY MR. WILNER: Dr. Carchman, let
2 me -- Since you were concerned about my
3 terminology, let me ask you, in general, did the
4 company consider the issue of nitrosamines
5 important as of 1963?
6 A. Yes.
7 Q. Okay. And why did the company think
that
8 nitrosamines were important in 1963?
9 A. Because they're found in tobacco smoke,
10 and a number of individuals had raised concern as
11 to the potential carcinogenicity of these
12 materials.
13 Q. Okay. Now, in 1964 the Surgeon General
14 report -- the first Surgeon General report came
15 out, correct?
16 A. Yes, sir.
17 Q. And, in fact, in your direct testimony I
18 think you said something like, "Well, the
19 Surgeon General said that the causes of lung
cancer
20 were multifactorial." Do you remember that?
21 A. Absolutely, I do.
22 Q. And that is -- was your recount of what
23 the 64 Surgeon General said?
24 A. Absolutely not.
25 Q. You didn't mention in your direct

7862

1 testimony, did you, sir, that the Surgeon General
2 in 64 found that "Cigarette smoking is causally
3 related to lung cancer in man, and the magnitude
of
4 the effect far outweighs all other factors"? Did
5 you say that in your direct testimony?
6 A. That wasn't part of the question I was
7 addressing, sir. And maybe you should continue to
8 read that passage in terms of where they talk
about
9 women.
10 Q. You want me to continue to read about
11 women? Is that what you said?
12 A. I think for completeness.
13 Q. Because Philip Morris did not believe in
14 1964 that women were affected?
15 A. No, sir. I'm talking about

16 completeness. The answer to my question that
17 Mr. Hardy asked me -- I referred to the
18 Surgeon General's report because the question that
19 Mr. Hardy asked me related to the complexity --
I'm
20 paraphrasing -- the complexity or other factors
part
21 involved. And I was only reflecting upon that
22 of the Surgeon General's report that dealt with
23 that issue, not any other part. I was not
24 intending to minimize the other aspects of the
25 report. But I was specifically addressing the

7863

1 question Mr. Hardy asked me.
2 Q. Does the report say, "The data for
women,
3 though less extensive, point in the same
4 direction"?
5 A. Yes, sir.
6 Q. Now, my question, I guess, was when you
7 said that the Surgeon General in 64 was talking
8 about there being multi -- lung cancer being a
9 multifactorial disease, why didn't you say that

the
10 magnitude of the effect of cigarette smoking far
11 outweighs all other factors?
12 A. I did say several times that the
13 epidemiological data in the United States -- that
14 smoking is the single largest risk factor for lung
15 cancer. I said that several times.

16 Q. Well, is that exactly the same as "the
17 magnitude of the effect of cigarette smoking far
18 outweighs all other factors"? Is that the same?

19 A. I believe it is.
20 Q. Okay. Now, after the Surgeon General's
21 report came out in 1964, what did Philip Morris

try
22 to do to -- with its customers, about the effect
of
23 the report on their use of the product?

24 A. I'm not sure I can answer that. I don't
25 know.

7864

1 Q. Well, let me show you a document.
2 MR. WILNER: Maybe if I just give you

the
3 tab, will that help? 85.
4 MR. HARDY: I need to see it.
5 Could we approach, Your Honor?
6 THE COURT: You may.
7 (Whereupon, the following discussion

took
8 place at the bench.)
9 THE COURT: Let me see the document.
10 Yes, sir?
11 MR. HARDY: Your Honor, I object to this
12 particular document because of Noerr-Pennington,
13 the lobbying issue that we raised with the Court
14 before. That's really what the bottom of page 2
15 and all of page 3 is about under labelling

actions,
16 talking about the intent or desire to try to hold
17 off labelling and contest that with the

18 legislature.
19 MR. WILNER: Well, A, that can be
removed from the document, if I've offered the document,
21 which I haven't even done yet. But, yes. B,
22 that's not Noerr-Pennington when they state what
23 they intend to do. It may be
24 Noerr-Pennington -- which I don't even accept, but
25 it may be Noerr-Pennington, their actual
statements

7865

1 or their lobbying activities. But just say "We
2 intend to do this, and we intend to do that" has
3 nothing to do with Noerr-Pennington. But that
4 wasn't the section I was going to ask him about
5 anyway.

6 THE COURT: Well, then, rather than
7 tackle the tougher question of whether it is or is
8 not Noerr-Pennington, I gather you don't object to
9 his objection?

10 MR. WILNER: Object to his objection? I
11 don't know what -- I guess I don't know how I can
12 object to his objection. All I want to do is get
13 the witness to authenticate the document or -- if
14 he can. Otherwise I have other ways of
15 authenticating it.

16 Then I'm going to ask if it's
17 inconsistent with his understanding of what the
18 company did with respect to the Surgeon General's
19 report, specifically with respect to its
customers,
20 which is in the beginning of the document.

21 THE COURT: Well, so, then, we don't
have
22 an argument at this point anyway as it relates to
23 the --

24 MR. WILNER: Right. Right. I wasn't
25 going to go into that.

7866

1 THE COURT: All right.

2 MR. WILNER: I'm sorry. I didn't get
3 that. Okay.

4 MR. HARDY: Excuse me, Mr. Wilner, just
5 so we don't have to come back up again.

6 So, as I understand it, then, in the
7 event that the witness authenticates this and in
8 the event that you end up offering it into
9 evidence --

10 MR. WILNER: Yes.

11 MR. HARDY: -- do I understand that you
12 will redact Roman Numeral 3 at the bottom of page

2

13 and all of page 3?

14 MR. WILNER: Yes. Until further
15 discussion, yes.

16 MR. HARDY: All right.

17 MR. WILNER: Thank you.

18 (Whereupon, the bench conference is
19 concluded.)

20 MR. WILNER: Thank you, Sheriff.

21 Q. BY MR. WILNER: Now, Doctor, I've handed
22 you a document called, "Confidential," January
23 29th, 1964, by Joseph Cullman the third, right?

24 Or, I'm sorry. It's by Weissman to Cullman,
25 correct?

7867

1 A. Yes, sir.

2 Q. And Weissman was the chief executive
3 officer of Philip Morris at the time?

4 A. He was a high executive.

5 Q. Chairman of the board, wasn't he?

6 A. Could have been, but he's a high
7 executive.

8 Q. All right. And who's Joe Cullman?

9 A. I think he was the chairman -- the CEO

of

10 the company.

11 Q. He was vice chairman, would become
12 chairman in 1967, correct?

13 A. If you say so. Another high executive.

14 Q. Okay. And they were discussing the
15 Surgeon General's report, which is the 1964 report
16 that we just saw, right?

17 A. Yes.

18 Q. All right. And the -- this was a
19 discussion among the highest levels of the company
20 of what to do about the 1964 report, right?

21 A. This was George Weissman's communication
22 to Mr. Cullman suggesting a number of responses.

23 Q. You would not agree with me that it was

a

24 discussion in the highest levels of the company,
25 between the CEO and the vice CEO?

7868

1 A. Well, between? I don't see a response
2 from Mr. Cullman. All I see is it's a note from
3 Mr. Weissman to Mr. Cullman laying out some
4 possibilities, signed by -- signed by
5 Mr. Weissman. I don't see any response from
6 Mr. Cullman, which would, in my way of thinking,
7 would be the discussion.

8 Q. Uh-huh. But Mr. Weissman at that time
9 was the chairman of the board?

10 A. If you say so. He's a high executive in
11 the company.

12 Q. Okay. And what does Mr. Weissman, the
13 chairman of the board, say about what the company
14 should do with respect to the -- in the effect of
15 the report on the consumers of the Philip Morris
16 product?

17 A. He lists -- This is broken down. This

is

18 a difficult copy for me to read. But he basically
19 breaks this down in terms of reaction and then
20 number -- Roman Numeral 1. Roman Numeral 2, a
21 public relations --

22 Q. Okay.

23 A. -- program. Then he has some other
24 things that --

25 MR. WILNER: Your Honor, I'll offer this

7869

1 next, subject to our discussion.

2 THE COURT: All right, then. Well,

let's

3 just make sure before it's marked that that --

it's

4 been appropriately redacted per our discussion.
5 MR. WILNER: Yes, Your Honor. I would
6 just like to show the first and second page, if I
7 might.
8 THE COURT: Now, is there nothing on the
9 second page that pertains to what we talked about?
10 MR. WILNER: No, Your Honor. We'll make
11 sure that there isn't.
12 THE COURT: Very well.
13 Q. BY MR. WILNER: Okay. So that we can
14 communicate more readily, let me show you what I'm
15 talking about, sir. Now, in the section on public
16 relations, states: "Public relations program, the
17 restraint and unity of the industry has been very
18 effective in this period. The opponents have had
19 their inning. The industry has demonstrated its
20 seriousness and responsibility in saying we would
21 study the report." Do you see that?
22 A. Yes, sir.
23 Q. Was the industry working together back
24 then?
25 A. I don't know.

7870

1 Q. You're not here to disagree, right?
2 A. I can neither agree nor disagree.
3 Q. All right. "However, at some point
4 reflecting on the same seriousness with which we
5 met the report, we must in the near future provide
6 some answers which will give smokers a
7 psychological crutch and a self-rationale to
8 continue smoking." Do you see that?
9 A. Yes, sir.
10 Q. Now, what is Philip Morris -- Well, let
11 me ask you this in this way: Based on this
12 document, was it Philip Morris's intent to provide
13 smokers a psychological crutch to continue smoking
14 in the face of public health information?
15 A. Actually, I don't see how this talks
16 about Philip Morris's intent. As you tried to
17 characterize this as a discussion, as far as I can
18 tell this is a note from Weissman to Cullman

saying

what

19 some things. The question to me is not simply
20 did he say but what did the company do,
21 and -- because I can't tell you what was in
22 Mr. Weissman's mind January 29th, 1964.
23 Q. All we have is his writing; isn't that
24 right?
25 A. And what we don't have is a discussion

7871

1 that you were referring to.
2 Q. So you want to know what Philip Morris
3 did, right?
4 A. Mr. Cullman. What did Mr. Cullman say

in

5 response to this and what did the company do.
6 Q. Well, before we get into that let me ask
7 you this: What is a psychological crutch?
8 A. I have no idea.
9 Q. How about the idea that it's not proven?
10 A. In -- With respect to being a
11 psychological crutch?

12 Q. Sure.

13 A. It's possible.

14 Q. How about the idea that it's just

15 statistics?

16 A. It's also possible.

17 Q. How about the idea that, well, if

there's

18 anything in cigarettes that cause harm we can take

19 it out?

20 A. Where does it say that?

21 Q. Well, bear with me. We'll get to that.

22 A. Okay.

23 Q. If there's anything in cigarettes that

24 hurt you we can take it out?

25 A. Well, I have a -- I'm trying to -- The

7872

1 other two examples you gave, I can't image that

2 being a psychological crutch. I'm not sure how

3 this statement then is also a psychological

4 crutch.

5 Q. You're not sure what statement is a

6 psychological crutch?

7 A. That this -- If it's there and it's bad,

8 we can take it out, how that would be a

9 psychological crutch.

10 Q. Okay. How about "Our products are not

11 injurious to health"? Is that a psychological

12 crutch?

13 A. No. That's a straightforward

declarative

14 statement.

15 Q. Well, it may be. But does it -- does it

16 function as a psychological crutch to help people

17 who may be concerned about what they see?

18 A. Sure. It's either true or not true. I

19 don't want to characterize it as a psychological

20 crutch. If you make a statement like that, it is

21 either true when you said it or it wasn't true

when

22 you said it.

23 Q. Well, in 1954 your company said, "We

24 believe the products we make are not injurious to

25 health." Was it true when they said it then?

7873

1 A. I believe it was.

2 Q. Is it true today?

3 A. No.

4 Q. When did they change?

5 A. When did "they" change?

6 Q. Yeah. When did it stop becoming true?

7 A. I would say the answer to that -- to

that

8 question in terms of the company's response, the

9 earliest -- and I've asked myself that question,

10 though I have not researched it exhaustively.

11 There was a hearing in which Mr. Cullman testified

12 before Congress. I think it was John Dingle's

13 committee, maybe the Commerce Committee. I'm not

14 sure. And Mr. Dingle asked him whether Mr.

Cullman

15 agreed with the warning labels at the time. And

16 those warning labels I think said something to the

17 effect about smoking may be injurious to your

18 health. And Mr. Dingle said, "Do you think that's
19 true" -- "Do you agree with that?" Sorry. And
20 Mr. Cullman said, "Yes."

21 So at least in 1969 there's at least one
22 statement that I was able to find, the earliest in
23 terms of somebody asking that question and the top
24 executive for the company responding.

25 Q. Well, did Philip Morris ever take out a
7874

1 retraction to what it published earlier and said,
2 "Oh, by the way, we no longer believe it's not
3 true anymore"?

4 A. A retraction?

5 Q. Yeah.

6 A. To what?

7 Q. Well, to the Frank Statement, to the
8 continuing controversy, to the Tobacco Institute
9 publication "Tobacco and Health." Need I go on?

10 A. Well, maybe we can, rather than go on,

go

11 back to the Frank Statement, which my
12 recollection -- because I have actually spent some
13 time looking at it and thinking about it. My
14 recollection was it appeared in a wide variety of
15 newspapers around the country. And it provided on
16 the left-hand side a statement of facts currently
17 believed to be true at the time, including one

that

18 you have asked me about, not being injurious to
19 health. And then there's the right-hand side of
20 that document that basically spoke to me and said,
21 "Though we're saying what we're saying on
22 the" -- "the left side based upon the best
23 scientific and medical knowledge that exists,

we're

24 going to set up an organization that's going to
25 carry out research to try to address a number of
7875

1 those issues."

2 So when you say "retract the document,"
3 the document has more than one face, more than one
4 part to it. And I would say that events had
5 overtaken that document in 1954 specifically and

in

reading

6 a very large way with the document you were
7 from, and that's the 1964 U.S. Surgeon General's
8 report, so --

9 Q. Perhaps -- Are you done?

10 A. If you want me to, I'll be done.

11 Q. Okay. Perhaps I didn't ask a very good
12 question because all I asked was, when did
13 Philip Morris retract its position that it had
14 previously stated many times over that it's --

that

injurious

15 it did not believe that its products were
16 to health? That's all I asked.

17 A. And my answer was the earliest evidence

I

18 could find, just me, was 1969, Mr. Joe Cullman
19 testifying before Congressman Dingle's committee

in

1969 Washington, D.C.
21 Q. And you think that Mr. Cullman after
22 continued to say that the company understood and
23 accepted that its products were hazardous?
24 A. I don't know what Mr. Cullman
25 continued --
7876
1 Q. Okay. Well, we'll get to that. Let me
2 hand you a document.
3 MR. WILNER: It's 91.
4 Q. BY MR. WILNER: Now, I've handed you a
5 document talking about cigarette design from 1965.
6 Do you see it?
7 A. Yes, sir.
8 Q. It says, "The 1965 cigarette,
9 confidential."
10 MR. HARDY: Excuse me, again, I
11 think -- Objection, Your Honor. I think we should
12 establish whether the witness has seen the
document
13 before he begins reading any parts of it.
14 THE COURT: All right.
15 Q. BY MR. WILNER: Have you seen this
16 document?
17 A. Is this a Philip Morris document?
18 Q. Oh, yes.
19 A. No. I don't recall ever seeing this
20 document.
21 Q. Well, let me see if you know any of the
22 terms. What is RADOX?
23 A. I have no idea.
24 Q. Who is Mr. Brunot, B-r-u-n-o-t?
25 A. I don't know any of the names on this,
on
7877
1 this front page.
2 Q. Did -- Was there a program to develop a
3 safer cigarette in 1965?
4 A. Yes. It was based on the memo you
showed
5 me earlier -- not the memo, the presentation that
6 Dr. Wakeham made to the board in 1961.
7 Q. Was there a target for a 1965 and 1966
8 cigarette?
9 A. I don't know the answer to that specific
10 question.
11 Q. Did -- Was there a target -- Regardless
12 of whether that document or any document,
13 did -- Was there a standard set for the 1966
14 cigarette that it would not be carcinogenic on
15 mouse skin painting?
16 A. I don't know. I mean, if it's in this
17 document, I need to look at it. But I don't know
18 the answer to that question.
19 Q. Take a look on 894.
20 MR. HARDY: Counsel's going to persist
in
21 asking questions about the document. The witness
22 has said he doesn't -- has never seen and doesn't
23 recognize any of the names on it. I guess we'll
24 have to ask to approach, Your Honor.
25 THE COURT: Well, I sustain the

1 objection. Foundation has to be laid as to a
2 document in order to delve into its contents.

3 Q. BY MR. WILNER: Doctor, have you tried
4 your testimony -- I mean, in your preparation for
5 testimony to look at the publicly available
6 documents on how the company -- what attempts the
7 company made to develop safer products over the
8 years?

9 A. I have looked at the R&D scientific
10 documents, and I have looked at the R&D plans for
11 doing that, yes.

12 Q. Let me ask you to turn to the very last
13 page. Maybe this will help. Very, very last
14 page.

15 MR. HARDY: Same objection.

16 THE COURT: Well, I'll have to wait and
17 see. I mean, I understand the objection. But I
18 don't know what's on the last page. And I don't
19 know whether the last page is in some ground, as
20 far as foundation.

21 Q. BY MR. WILNER: Are you on the last
22 page? It's a redact form.

23 A. 895?

24 Q. No. It just says, "Redact form."

25 A. This?

1 Q. Okay.

2 A. Okay.

3 Q. What is the name on top of the redact
4 form?

5 A. Philip Morris.

6 Q. Okay. Now, does that in any way --

7 MR. HARDY: Well, I do ask to approach.
8 This is not part of the document, the page he's
9 talking about.

10 MR. WILNER: Well, it is too.

11 THE COURT: Well, I tell you what, let's
12 go ahead and take a ten-minute recess, and maybe
13 you all can compare documents in the meantime.
14 We'll take it up before we bring the jury back in.

15 (Whereupon, the jurors were excused from
16 the courtroom.)

17 (Whereupon, a 14-minute recess ensued at
18 3:10 p.m.)

19 (Out of the hearing of the jury.)

20 THE COURT: I should also urge that any
21 other documents in that ten-minute interim that

22 had, Mr. Wilner, that you could share with
23 Mr. Hardy before we bring the jury back in, that
24 that might help to speed matters on.

25 Did you all clear up the last document?

1 MR. WILNER: We haven't cleared it up,
2 Your Honor. My position is that it's produced by
3 Philip Morris and that I should be able to put it
4 into evidence because it's Philip Morris's

5 concerning the design of its products. And the
6 specific areas of testimony of this witness,
7 regardless of whether this witness has seen it, as

my 8 it -- goes to the facts which I may establish in
9 case or in my cross-examination case.
10 As it -- it has a -- The last page on it
the 11 says, "Philip Morris," and explains that one of
12 pages in it had been redacted for some reason.
13 Don't know anything about that. But I don't care.
14 I'll represent that I got it out of a production
15 that Philip Morris made and that it's from their
their 16 files and that it concerns their products and
17 various issues which are central to what we've
been 18 talking about.

19 So whether this witness has seen it or
20 not is another issue which we -- it may -- we
21 may -- Your Honor may limit me in my questions on
22 that particular document. But I think I have the
23 right to put the document in if it's otherwise
24 admissible and go on from there.

25 MR. HARDY: Two -- That's really two
7881

1 points, I think, Your Honor. And I think it's
2 clear from -- with respect to the point concerning
3 foundation or identification from this witness,
4 that he can't provide it. He's already said that.
5 He's neither sign the document nor does he
6 recognize the names of the people on here.

7 THE COURT: I understand.

8 MR. HARDY: The other point goes back to
9 what we started discussing with the Court and the
10 special master weeks ago, that there was no
11 discovery taken in this case. There was no effort
12 to discover documents by plaintiffs' counsel, and
13 they now in the trial try to put the defendants'
14 lawyers in the position of having to vouch for the
15 authenticity or deny the authenticity of
16 documents.

17 And Mr. Wilner says this was produced by
18 Philip Morris. Well, if he wanted tobacco in a
19 position where he could establish that with the
20 Court, he should have done that through formal
21 discovery instead of just basically coming in and
22 making that statement with regard to documents
23 which we did not produce to him in this
litigation.

24 Now, there are some other problems with
25 the documents: Handwriting that can't be

7882
1 identified and a missing page and the like. But I
2 don't think we need to get into those.

3 THE COURT: Well, given that you two
4 gentlemen have different positions on it, I guess
5 the question, Mr. Wilner, would be, what is the
6 rule of evidence that would make it admissible?

7 MR. WILNER: It's admissible as a
8 statement of a party, A, under what -- I need my
9 rule book to remember the numerals. But it's
10 coming from the research department of
11 Philip Morris. It's a party admission, admission
12 by a party opponent.

13 THE COURT: What's the rule number?

14 MR. WILNER: It's 803(1.2).
15 THE COURT: Sheriff, pass me the
16 document, please.
17 MR. WILNER: In a representative
18 capacity.
19 And I will speak to the authentication,
20 if Your Honor permits me.
21 THE COURT: Well, let me look at the
22 document first.
23 MR. WILNER: Here it is.
24 THE COURT: Well, how do you
authenticate
25 these documents?

7883
1 MR. WILNER: Well, the first thing is I
2 authenticate them because they were produced to me
3 in litigation by Philip Morris.
4 THE COURT: Well, of course you're not a
5 witness.
6 MR. WILNER: Well, but no attorney can
7 ever do anything but that, Your Honor, except say
8 where he got the document. I mean, I don't know
9 how else any document can be
10 produced -- authenticated. We don't produce them
11 under seal anymore.
12 THE COURT: Well, I don't know the
13 procedure, though, whereby the lawyer can testify
14 as to the foundation, particularly not under oath
15 with introduction of documents as far as
16 authentication.
17 MR. WILNER: Well, if we request
18 documents from the defendants and they produce
19 them, I don't know how else --
20 THE COURT: I have no idea about that,
21 and --
22 MR. WILNER: Well, perhaps the defense
23 would say yes or no that they produced it. If
they
24 produced --
25 THE COURT: Obviously, just as Mr. Hardy
7884
1 has pointed out, if you made the foundation for
2 these documents prior to this trial by simply
3 asking the defendants to admit that these were
4 their documents produced at a certain time in
5 certain litigation, they would have been duty
bound
6 to make the admission, and we wouldn't be here
7 wrestling with it this afternoon.
8 MR. WILNER: Well, we might still be,
9 Your Honor, but --
10 THE COURT: Well, we certainly wouldn't
11 be wrestling with the question of authenticity.
12 MR. WILNER: Well, we might, but we
still
13 have two other things: Number one, the last page
14 of the document says it's a -- is a Philip Morris
15 redact form. And, number two, they -- they have
16 answered requests to produce in this case by
17 referring the plaintiffs -- or rather in Memphis
18 cases by referring the plaintiffs to their
document
19 depository that they have made public.

over 20 THE COURT: Well, I think we've gone
21 that at some point in the past with regard to some
22 other matters. That sounds familiar. And it
23 sounds like, to me, that we had some rulings
24 pertinent to that. I don't know. Did we? I know
25 Ms. Johnson and some of the lawyers, we had some
7885
1 discussion about that, I believe. If that being
2 the case, then I think I ruled on that.
3 Mr. Hardy?
4 MR. HARDY: There was no request for
5 production of documents in this case. I don't
6 understand what Mr. Wilner is talking about. They
7 didn't ask us for any documents in this lawsuit.
8 THE COURT: Well, he said "other Memphis
9 cases," is what he said. But anyway --
10 MR. WILNER: Your Honor, there is a case
11 in -- You know, we -- The problem is, my
12 understanding of the code of ethics is that it is
13 unethical for a lawyer to request a document that
14 he already has. I think it's unethical. It goes
15 beyond being inconvenient. I believe it to be
16 unethical. I think that is called burdensome
17 discovery. It's called discovery by -- It's
called 18 using discovery as a sword. And I don't believe
19 that I'm permitted to ask to --
20 THE COURT: Well, I don't -- Again,
that, 21 to me, is beyond appeal with regard to
establishing 22 foundation for admissibility of this document.
23 I come back -- The only thing really
that 24 I've got, having looked at the document, is this
25 last page. It says, "Philip Morris redact form."
7886
1 And is there anything else? I mean, I understand
2 the arguments that you would make. But is there
3 anything else as it relates to this document?
4 MR. WILNER: Your Honor, all we would
say 5 is that if the defendants are not required to
state 6 whether they have produced this document to me or
7 not, then -- if they'll say that on the record or
8 whatever that it's not their document, then that's
9 fine --
10 THE COURT: I'm not going to get into
the 11 middle of this lawsuit by demanding admissions
from 12 either side.
13 MR. HARDY: I appreciate that,
14 Your Honor. But, in view of what's been said, I
do 15 think that it's unnecessary for me to make the
16 following statement, but I will make it with
17 respect to this document. I honestly do not know
18 whether that's a Philip Morris document. I've
19 never seen it before in my life. I don't know
20 whether that redact form is from a law firm or

21 Philip Morris. I have no idea whether that's a
22 Philip Morris document.
23 MR. WILNER: Okay. We'll take that.
24 We'll go on.
25 THE COURT: Then I sustain the

7887

1 objection.
2 All right. Let's have the jury.
3 (Whereupon, the jury was seated in the
4 jury box.)
5 THE COURT: All right. Ladies and
6 gentlemen, thank you.
7 Mr. Wilner, you may continue your
8 cross-examination.
9 MR. WILNER: Thank you, Your Honor.
10 Q. BY MR. WILNER: Doctor, remember we were
11 talking about the concept of psychological crutch?
12 A. Yes, sir.
13 Q. Did Philip Morris use filters and
14 filtered cigarettes as a psychological crutch to
15 allow people who might be concerned to keep buying
16 the product?
17 A. Not that I'm aware of.
18 Q. Well, did Philip Morris suggest that its
19 filter -- internally, that its filters were most
20 important because of the illusion of filtration?
21 A. Illusion of filtration?
22 Q. Yeah. The illusion of filtration.
23 A. If you have a document that speaks to
24 that, I --
25 Q. Well, first I'll just ask you, based on

7888

1 all the documents you've seen and all the talking
2 you've done --
3 A. I haven't seen any scientific documents
4 that speak to that issue.
5 Q. Well, was it understood at Philip Morris
6 that filters might be a way to get people who
7 otherwise try to stop to feel comfortable about
8 smoking again?
9 A. I never heard anybody in the R&D
10 organization that I've come in contact with that
11 have spoke in that way.
12 Q. Well, let me hand you this document.
13 MR. WILNER: 100.
14 THE COURT: You need to approach the
15 witness, Mr. Wilner.
16 MR. WILNER: Thank you, Your Honor.
17 THE WITNESS: Thank you, sir.
18 MR. WILNER: Thank you.
19 MR. HARDY: I think you gave us the

might

wrong

20 number.
21 MR. WILNER: 100. I'm sorry. Perhaps
22 you can tell then from the document itself.
23 THE COURT: All right. The witness has
24 the document. Are there any objections as it
25 relates to the document -- I mean, not document

but

7889

1 the further inquiry?
2 MR. HARDY: Well, do you have an extra

3 copy?
4 MR. WILNER: I'm sorry. I only have two
5 copies.
6 MR. HARDY: We can't seem to find a
copy,
7 Your Honor. I'm sorry.
8 MR. WILNER: Your Honor, I don't think
9 this will be a problem, really. If we can
proceed,
10 I think we can take care of Counsel, and I can
hand
11 him my copy as soon as I get a chance to move
12 forward.
13 THE COURT: Well, feel free.
14 MR. WILNER: There you go.
15 MR. HARDY: No.
16 MR. WILNER: Your Honor, I don't mind if
17 he looks over my shoulder. I've had people do
that
18 before.
19 MR. HARDY: Thanks for the offer.
20 MR. WILNER: All right. Fine. Just
21 don't get too close.
22 Q. BY MR. WILNER: Doctor, I've handed you
a
23 document called Special Report Number 248, Market
24 Potential of a Health Cigarette. Do you see that?
25 A. Yes, sir.
7890
1 Q. All right. Look on the first. It says
2 "Confidential" on it, right?
3 A. Yes, sir.
4 Q. And then would you look on the page
where
5 it says June 1966, the title page as it were?
6 A. Yes.
7 Q. You see it's written by M. E. Johnson,
8 Jr.
9 A. Yes.
10 Q. A researcher at Philip Morris?
11 A. Yes, sir.
12 Q. Approved by William Dunn. Do you know
13 who he is?
14 A. Yes, sir.
15 Q. He is another researcher at
16 Philip Morris, right?
17 A. Yes.
18 Q. Distributed to Helmut Wakeham, the same
19 Wakeham we've been talking about, right?
20 A. Yes, sir.
21 Q. And also distributed to Mr. R. B.
22 Seligman, correct?
23 A. Yes, sir.
24 Q. And the subject matter, as far as you
can
25 tell, you'll agree with me, was the question of
7891
1 marketing of a health -- what they call -- well,
2 I'll just say it -- "market potential of a health
3 cigarette." You see that?
4 A. Yes, sir.
5 MR. WILNER: Okay. Now, I'll this offer
6 as the next.

7 THE COURT: All right. Any objection?
8 MR. HARDY: Your Honor, I'm sorry, but
9 not having had a chance to read the document and
--
10 MR. WILNER: Let me just offer the first
11 five pages.
12 MR. HARDY: All I know to do this is ask
13 for a moment to read it.
14 MR. WILNER: Here.
15 MR. HARDY: Well, Your Honor --
16 THE COURT: Yes, sir.
17 MR. HARDY: The representation is that,
18 as I understand it, the document -- portion of the
19 document being offered into evidence is pages 1
and
20 2 and the third paragraph of page 3.
21 MR. WILNER: Uh-huh.
22 MR. HARDY: If that's correct, I have no
23 objection to that portion of the document.
24 THE COURT: Well, let's have
25 that -- Let's have that marked. We'll make sure
7892
1 that we've got only marked that part of it that
has
2 been agreed on. Obviously the same would be true
3 as to whether it was displayed on the screen.
4 MR. WILNER: Yes, Your Honor. I guess
if
5 we could have it marked, and we'll just if we
6 have --
7 THE COURT: Let's mark it for
8 identification until it's been properly --
9 MR. WILNER: Well, I would like to show
10 those parts on the screen.
11 MR. WILNER: We'll mark this for
12 identification, please. Thank you, Sheriff.
13 (Whereupon, Exhibit Number 383 was
marked
14 for identification.)
15 Q. BY MR. WILNER: All right. Doctor,
let's
16 see if we can move through this a little bit
faster
17 now.
18 First, was this a report, as far as you
19 can tell, from some parts of the company to other
20 parts of the company about marketing a health
21 cigarette?
22 A. Yes.
23 Q. And remember I asked you about whether
24 Philip Morris thought that it was just as
important
25 to market an illusion of filtration as it is the
7893
1 reality of filtration?
2 A. Yes.
3 MR. HARDY: Excuse me. I think
4 that's -- I object. That's a misstatement of the
5 prior question to the witness.
6 THE COURT: Overruled.
7 Q. BY MR. WILNER: All right. Now, let's
8 see what is said here by these -- First let me
show

9 you who this document went to and who authored it.
10 This is by Philip Morris, "Special
Report
11 Number 248, Market Potential of a Health
Cigarette,
12 Confidential," written by M. E. Johnson, approved
13 by W. L. Dunn. We talked about that, right?
14 And distribution, is that -- that's
15 Dr. Wakeham who was in charge of the whole
research
16 department, right?
17 A. Yes.
18 Q. And Seligman was right under him, I
19 think, at that time, right?
20 A. I think that's right.
21 MR. HARDY: Your Honor, may I come up
22 here where I can see the screen?
23 THE COURT: Sure.
24 MR. HARDY: Thank you.
25 Q. BY MR. WILNER: Okay. And then under

7894

1 "Conclusions," it says, "The result of the
2 investigations: A large proportion of smokers are
3 concerned about the relationship of smoking to
4 health. See appendix. The anticigarette
5 propaganda problem would be more effective in
6 reducing the rate of smoking recruitment than
7 stimulating smokers to quit. The market share of
8 health cigarettes increases rapidly for a brief
9 period during each health scare and quickly
10 stabilizes at a new and higher level of market
11 penetration."

12 I'm going to ask you in a minute about
13 the question I'm going to lead up to.

14 "The Surgeon General's report had a
15 markedly less effect on the demand for health
16 cigarettes than the first health scare in the 50s.
17 Any future health scares would probably have even
18 less effect. Thus, a new health cigarette entry
19 could not rely on increased demand for health
20 cigarettes but would have to take it in" -- "take
21 its place at the expense of existing brands of
22 health cigarettes."

23 And then, Number 10: "The illusion of
24 filtration is as important as the fact of
25 filtration." Do you see that?

7895

1 A. Yes, sir.

2 Q. Now, do you understand what that means?

3 A. Possibly. I mean, the -- I think I do,
4 yes.

5 Q. Assuming that that was -- Well, would
6 that be the proper and ethical thing for a company
7 to do?

8 A. Well, if one takes this Number 10 or

even

9 takes this document in its entirety and tries to
10 inject this as to how the company behaved, I think
11 for completeness one ought to look at what the
12 company did in the marketplace with regard to
13 filters and not simply what two researchers
14 communicated to two very high level people within
15 R&D.

16 Q. Maybe I didn't ask my question -- I'm
17 sorry. I'll try again. I didn't ask you to
18 explain what you thought the company did. I'll
19 give you a chance to do that. I'll talk about
20 that. What I asked you is whether you thought
this
21 was the right thing if it were done.
22 A. You're asking me to make an assumption
23 that this is what the company did. You're asking
24 me if that would be the wrong thing to do with
25 regard to the marketplace, and I would submit to
7896
1 you if indeed that's what they did I would be
2 troubled -- troubled by that.
3 Q. Then on page 3, the third paragraph --
4 MR. WILNER: And, Your Honor, let me
5 state all the folding we're doing is just to
remove
6 the Congressional issues, the issues about
7 legislation that we've agreed we wouldn't discuss.
8 THE COURT: Well, I understand what
9 you're saying. Okay.
10 Q. BY MR. WILNER: And this is Paragraph 3.
11 I'm sorry.
12 "My recommendation is that we not
13 introduce a new, only" --
14 MR. HARDY: Excuse me.
15 MR. WILNER: We're trying. We're
16 trying.
17 Only three.
18 MR. WILNER: This is just
19 because -- because it talks about Congress.
20 Q. BY MR. WILNER: "My recommendation is
21 that we not introduce a new health cigarette
unless
22 there is another health scare or additional
23 restrictive legislation is passed. In the event
of
24 another health scare or restrictive legislation,
25 our entry should be determined by the form of the
7897
1 scare or legislation." Do you see that?
2 A. Absolutely I see it, yes.
3 Q. Now, does that indicate a sincere desire
4 to make a safer product in your opinion if that's
5 what the company did?
6 A. If that's what the company did, which it
7 didn't, that would be an insincere expression.
8 Q. Okay. And you believe that in
9 this -- Have you seen this document before,
Special
10 Report Number 248?
11 A. I believe I have looked at this a long
12 time ago.
13 Q. And when you saw it, were you shocked
14 that it -- that it shows what it shows?
15 A. What it -- It doesn't show anything. I
16 just says some things. What I did was I then
17 looked at over a period of time that preceded,
18 covered and past this, in terms of what kind of
19 filters and products the company put out over this
20 period of time, of which there were several.
21 So, I mean, this is an interesting

22 document. It says what it says. Okay. You read
23 the words. I read the same words. But in terms
of
24 the products the company put out on the market are
25 made available to the consumers, are not
7898
1 consistent -- compatible with what you're
2 suggesting the company's behavior is. I can't --
I
3 can't -- I won't deny what this document says.
4 Q. So you're saying that the company put
out
5 cigarettes which were really safer, not just the
6 illusion of safety?
7 A. I didn't say that nor does this document
8 say that.
9 Q. Well, can you answer my question? Did
10 the company put out products in 1966 which were
11 really safer? Or did they just put out products
12 which were an illusion of safety?
13 A. Well, in terms of the products that R&D
14 developed that were put on commercial products, it
15 went out on the marketplace. My belief is those
16 products were truly designed and intended to
reduce
17 smoke constituents that were of -- were of
18 concern. And those filters did address many of
19 those smoke constituents.
20 Q. Well, what filters were put on the
market
21 by Philip Morris in 19 -- in the 1960s?
22 A. It was -- It was an acetate filter that
23 had acetate put on it that basically significantly
24 reduced the phenols.
25 Originally it was an expression, for
7899
1 example, that phenols were carcinogenic. And so
2 the filters were modified to significantly reduce
3 the phenols. To the extent that those original
4 concerns were based on science at the time, that,
5 to me, is a responsible course of action.
6 It turned out later that Dr. Van Duuren
7 at NYU basically did a study in animals showing
8 that the phenols inhibited the carcinogenicity of
9 other substances in smoke, but we continue to use
10 those filters. That would be one example that
sort
11 of springs to my mind at this point in time.
12 Q. Well, I mean, what brands?
13 A. I would have to go back and look. But
14 that's contained within the central file documents
15 of Philip Morris in terms of the
16 historical -- historically the introduction of
17 various modifications and in what brands they were
18 introduced into.
19 Q. But you just had a conclusion. You were
20 telling us that there was a -- that the safety was
21 real and not an illusion. And I asked you what
22 brands are you talking about. You don't even
23 know.
24 A. Well, you never asked me if the safety
25 was real or illusion.

7900

1 Q. Well, now I'm asking you.

2 A. Well, if -- if I could answer the first
3 question --

4 Q. Well, yes. So answer the first one.
5 What brands?

6 A. Okay. That Actually that wasn't -- The
7 first question was, was it an illusion or was it
8 safer? And that was part of some other question
9 you were trying to introduce. So if you can state
10 clearly the question you want me to address, I

will

11 try to -- I will try to be responsive.

12 Q. What brands?

13 A. I would have to go back and look. But
14 that's captured within the documents at
15 Philip Morris. I can't tell you at this point in
16 time 30-something years ago what brands were
17 introduced with those filters. But I am telling
18 you there were brands introduced into the market.

19 Q. What tests supported that those brands
20 were any safer?

21 A. I didn't say that any tests were done,
22 that they were safer. I said they were done in
23 response to public health scientists expressing a
24 concern that a substance like phenols, which are
25 found in tobacco smoke --

7901

1 Q. Excuse me. There's no need to repeat.
2 Let's move on. All I asked you was, what tests?
3 Are there none? There were no tests proving or
4 establishing that these products are any safer,
5 right?

6 A. That's correct.

7 Q. Okay. Now -- Okay. So let's go along.
8 Now, remember you told me that Joseph Cullman who
9 was the chief executive officer of -- beginning in
10 1967, and we were talking about whether Joseph
11 Cullman had -- had agreed or had said or had
12 admitted that the products were hazardous.
13 Remember? And you said, well, he did in 1969?

14 A. I remember I pointed out the 1969
15 statement, yes.

16 Q. Okay. Well, let's first look at what
17 Mr. Cullman said in 1966, because that would have
18 been after he received Wakeham's report in 1961.
19 Do you remember?

20 A. Yes.

21 MR. WILNER: Okay. And it's in
22 evidence -- marked in evidence as -- I'm sorry,
23 give me a minute -- 135.

24 I'll ask that this -- I'll use my copy
25 since it's quicker than finding the evidence.

7902

1 Thank you.

2 MR. WILNER: All right. Then it won't
3 be. It's Exhibit 134 -- no, 135. Thank you.
4 Thank you. Appreciate it.

5 Q. BY MR. WILNER: Okay. And these are
6 Mr. Cullman's remarks, are they not? Public
7 remarks?

8 A. That's what this document suggests, yes.
9 Yes.

10 Q. All right. And let me direct you to

page

11 10. Let's first put them up just for a second and
12 see whether you agree or disagree. These are the
13 remarks of Joseph Cullman the third, president of
14 Philip Morris at the South Carolina Tobacco
15 Warehouse Association at Myrtle Beach, South
16 Carolina, 1966. So evidently they made a record

of

17 what he said, right?

18 A. It would appear so, yes.

19 Q. Okay. Now, I want to direct your
20 attention to page 10, the bottom of the page?

21 A. Yes, sir.

22 Q. Now, did Mr. Cullman, five years after
23 receiving Helmut Wakeham's paper that said "We

have

24 carcinogens that we can't remove," say, "It has
25 been said before and I want to emphasize again if

7903

1 there is something in tobacco or in the smoke that
2 causes cancer or any other human disease, we want
3 to know what it is. If there is something

harmful,

4 I am confident that scientists can remedy it. To
5 date, however, extensive chemical tests have

failed

6 to specify any substance, as found in cigarette
7 smoke, that accounts for human disease."

8 Now, did you know Mr. Cullman said that?

9 A. No. I have not seen this, this
10 particular document before.

11 Q. Was it true when he said it?

12 A. To date, however, extensive -- Yes. The
13 last sentence is true. Extensive chemical tests
14 have failed to specify any substance as found --

as

15 found in cigarette smoke that accounts for human
16 disease. It was true in 1966.

17 Q. Well, I thought that Wakeham had just
18 told him five years earlier that there were
19 substances in cigarette smoke that were
20 carcinogens?

21 A. Yes. And if you would like to go back

to

22 that document, we can talk about it in a more
23 thorough and complete fashion.

24 Q. Well, we will in just a second.

25 A. Okay.

7904

1 Q. Are you saying, then, that this is a

true

2 statement in its implication? Or are you saying
3 that this is -- that what he was doing here is

kind

4 of teasing the words?

5 A. No. I don't see any teasing. I think,
6 as I read this last sentence, it was true in 1966
7 and in no way undermines, contradicts what
8 Dr. Wakeham had to say in 1961.

9 Q. Well, let's take the first part of it
10 here. "If there's something harmful, I am
11 confident that scientists can remedy it."
12 Didn't -- Didn't Wakeham in 61 say the best we can

13 hope for is to remove a few?
14 A. I'm not sure he said -- said it
15 quite -- quite that way. I think he was talking
16 about classes rather than specific compounds.
17 And I think it's -- it's nice that
18 Mr. Cullman gives so much credit to the scientists
19 in R&D for being able to do this. But in
20 Dr. Wakeham's memo, I think he -- his 61 memo he
21 talks about the fact that we're going to need
time,
22 money and patience.
23 Q. Does Wakeham in his memo ever say that
24 he's confident that scientists can remedy it?
25 A. No, he doesn't.
7905
1 Q. So where did Cullman get it that he's
2 confident that scientists can remedy it?
3 A. I guess Mr. Cullman, who is not a
4 scientist -- somebody would have to ask
5 Mr. Cullman. Clearly Dr. Wakeham did not in any
of
6 his documents that I have read suggest that this
7 would be an easy thing -- easy thing to do.
8 Q. Isn't this another example of a
9 psychological crutch?
10 A. How so?
11 Q. Well, to tell people if there's anything
12 bad in it we can get it out?
13 A. Well, this says, "I am confident." And
I
14 say, well, okay. Mr. Cullman said this. But
15 Dr. Wakeham never -- never said this or implied
it,
16 and Mr. Cullman is not -- is not a scientist.
17 Q. And Mr. Cullman was speaking for the
18 Philip Morris company to the public, right?
19 A. To whatever this organization was, yes.
20 Q. And in speaking to the public, then,
21 his -- he was disagreeing with his own scientists?
22 A. Disagreeing or not understanding
23 properly. I can't answer that question.
24 Q. To date now -- the Wakeham, the 1961
25 Wakeham piece that was not public, right?
7906
1 A. What was not public?
2 Q. The 1961 Wakeham report, the one we
3 talked about first, that was not public?
4 A. That was made to the board of directors
5 of Philip Morris.
6 Q. Not public?
7 A. That's correct.
8 Q. All right. So someone in the public
9 would not know about Wakeham's thoughts. They
10 would only know what Cullman said, correct?
11 A. I think you're correct.
12 Q. Let me just take the last one. "To
date,
13 however, extensive chemical tests have failed to
14 specify any substance as found in cigarette smoke
15 that accounts for human disease." Now, what tests
16 is he talking about?
17 A. I don't know. You would have to ask
18 Mr. Cullman. I do know what Dr. Wakeham laid out

the 19 in terms of tests and subsequent documents. To
Cullman 20 extent that Dr. Wakeham laid it out and Mr.
what 21 not being a scientist, I can't really speak to
22 was in Mr. Cullman's mind in this -- in this
23 particular --
24 Q. Well, in fact --
25 A. -- section.

7907

1 Q. In fact, the extensive chemical tests
2 he's talking about were exactly those tests that
3 revealed the carcinogens, the polyaromatic
4 hydrocarbons, the tobacco-specific nitrosamines,
5 the phenols, those were exactly the chemical tests
6 that Wakeham had done?
7 A. Actually, again, you're not accurately
8 characterizing it. Tobacco-specific nitrosamines
9 were not even known to exist at that time let
alone
10 be able to be measured.
11 In terms of the polyaromatic
hydrocarbons
12 and the phenols, if we go through the list of
13 carcinogenic compounds that Wakeham lists which
are
14 derived from publicly available information,
15 several of the items that Wakeham lists as
16 carcinogenic are no longer in light of today's
17 science viewed as being -- as being carcinogenic.
18 And their identification of being carcinogenic
does
19 not come from the fact that they're find in
tobacco
20 smoke. They're primarily derived from animal
21 studies --
22 THE COURT: I think, just in the
interest
23 of time, I'm going to suggest absolutely more
24 brevity with regard to the responses. I think the
25 question was whether or not the tests referenced
in

7908

1 the letter here were the tests from Wakeham.
2 THE WITNESS: And I don't know the
answer
3 to that question.
4 Q. BY MR. WILNER: Well, let me just
refresh
5 your memory. Not to belabor this, but this is
from
6 page 434 of the Wakeham document that's in
7 evidence.
8 Is that what Wakeham told him at the
9 time, five years earlier, the partial list of
10 compounds in cigarette smoke identified as
11 carcinogens, including benzopyrene and many
others,
12 benzene, xylene, pyrrole, ethyl alcohol, et
cetera,
13 et cetera, correct?
14 A. Yes. That is the list.

15 Q. So what did Mr. Cullman mean when he
said 16 there were extensive chemical tests failed to
17 specify anything? Do you know what he was talking
18 about?
19 A. He wasn't talking about that list. He
20 was talking about biological -- biological tests.
21 Q. Well, why did he say chemical tests?
22 A. He's not a scientist. I have no idea
23 why. He knows -- if he even knows the difference
24 between a chemical test and the biological test.
25 Q. So he's the president, and he was wrong?

7909

1 A. Could very well have been mistaken.
2 Q. Do you think he was deliberately
3 mistaken?
4 A. I don't believe so, but I don't know.
5 Q. Was he trying to provide another
6 psychological crutch to people?
7 A. I doubt it.
8 Q. Okay. Now, did Philip Morris conduct
9 mouse skin painting in secret in the 1960s?
10 A. Philip Morris conducted mouse skin
11 painting in its laboratories and sponsored mouse
12 skin painting in a number of outside laboratories.
13 Q. Did it -- I guess I didn't -- wasn't
14 clear when I asked that. I'm sorry. I asked if

it 15 had done it in secret.

16 A. And "secret" means what?
17 Q. Secret means not available to the

public? 18 A. Some of them were done and not made
19 available to the public. Some of it was -- was
20 done and actually presented to public health
21 officials and published in the peer review
22 literature.

23 Q. On commercial products?

24 A. On commercial products? Not that I'm
25 aware of.

7910

1 Q. So let me get this straight.
2 Philip Morris did not -- Philip Morris's
conducting 3 of these skin painting tests in the 1960s on
4 commercial products were secret?

5 A. I'm not aware of any biological testing
6 that Philip Morris has done -- bless you --
7 directly or indirectly that deals with commercial
8 products.

9 Q. Now, let me hand you this document,
10 107 -- 109, sorry.

11 A. Thank you.

12 Q. Now, do you see --

13 MR. HARDY: Just a minute.

14 MR. WILNER: Okay.

15 MR. HARDY: Excuse me. Go ahead.

16 Q. BY MR. WILNER: Do you see this document
17 was by -- authored by Dr. R. D. Carpenter?

18 A. By Mr. Carpenter.

19 Q. You know him?

20 A. I knew him.

21 Q. And it was -- it was received by

22 Dr. Helmut Wakeham, correct?
23 A. Yes.
24 Q. And the date is October 27th, 1967,
25 correct?

7911

1 A. Yes.
2 Q. And it's marked "Confidential," correct?
3 A. Yes, sir, to both.
4 Q. And it shows a copy to Dr. T. S. Osdene,
5 O-s-d-e-n-e, right?
6 A. Yes, sir.
7 Q. Now, who was Dr. Osdene just for a

second

8 because he testified in this trial by deposition?
9 A. Dr. Osdene was a scientist at
10 Philip Morris R&D for a number of years.
11 MR. WILNER: Okay. I offer this one.
12 MR. HARDY: I have no objection to the
13 document. I also have no reason to believe that
14 "confidential" is a part of the original
15 document. But apart from the stamp on here -- and
16 I don't know where that came from -- I have no
17 objection to a clean copy of this document.
18 MR. WILNER: I don't know what he has,
19 Your Honor, but if he's got another copy --
20 MR. HARDY: All I'm saying is --
21 THE COURT: Let me see it, Sheriff.
22 MR. WILNER: If you've got one that
23 doesn't have it, let me have it.
24 MR. HARDY: I don't. I want it
25 redacted.

7912

1 MR. HARDY: Your Honor, my point is
2 Mr. Wilner has referred to this confidential
stamp,
3 which I believe has something to do with
production
4 in a lawsuit. I don't think this was on the
5 document when it was authored at Philip Morris.
6 And I don't think it's a part of the original
7 Philip Morris document. I'm just suggesting that
8 that be taken off along with the exhibit number at
9 the bottom. And apart from that I have no
10 objection to it.

11 THE COURT: All right. Well, assuming
12 that Mr. Wilner doesn't have an explanation as to
13 where the stamp comes from, I don't think we

should

14 waste a lot of time on it, do you?
15 MR. WILNER: I don't want to waste time,
16 Your Honor. But if Philip Morris has a copy that
17 doesn't have the stamp on it --
18 THE COURT: Well, let's just take a pen
19 and draw through it completely and also the

exhibit

20 stamp. I'll do this on mine, and you do it on the
21 one you've got, and we can go on.
22 MR. WILNER: We offer this as our next
23 number.
24 THE COURT: All right. Without
25 objection.

7913

1 (Whereupon, Exhibit Number 384 was

marked

2 for identification and admitted into evidence.)

3 Q. BY MR. WILNER: All right. This is a
4 1966 -- 1967, I'm sorry. It's called "All Burley
5 cigarette." "The skin painting study began in
6 April 65 has been completed and evaluated. In

that

7 study all smoke condensate but one were judged to
8 be carcinogenic to mouse skin."

9 Now, is that generally what happened

when

10 Philip Morris internally tested its products with
11 mouse skin painting? They failed?

12 A. I don't understand. They failed? They
13 failed what?

14 Q. Flunked. As your attorney said, flunked
15 the test?

16 A. And by "flunk" you mean what?

17 Q. I mean caused cancer.

18 A. Sir, smoke condensate has repeatedly

been

19 demonstrated to produce cancer when applied to the
20 skin of mice for 35 to 35 years, not just in
21 Philip Morris's laboratory but in a number of

other

22 laboratories around the world. That is the basic
23 nature of the smoke condensate.

24 Q. I thought Philip Morris had criticized
25 the Wynder studies in 1953 as being the wrong

7914

1 animal, the wrong method of application, too much
2 condensate, et cetera, et cetera, hadn't it?

3 A. Yes.

4 Q. All right. Now, here we have that
5 Philip Morris publicly criticizing this study is

in

6 private doing it and finding the products are
7 failing; is that true?

8 A. It's not a question of finding the
9 products are failing. It was known, again, for
10 decades that cigarette smoke condensate does this.
11 I don't care whose products they are. This would
12 not be a surprise to anybody, even in 1966.

13 And the fact that Philip Morris
14 criticized the Wynder studies from the 50s in no
15 way, shape or form should preclude the company

from

16 examining that particular assay. We do this -- We
17 have done this with every single assay that has
18 been scientifically put out there in the
19 literature.

20 Q. Well, if you knew -- If it was so widely
21 known that the products were going to fail the
22 test, why did you bother to do it?

23 A. Because in terms of trying to examine

the

24 properties of the assay with respect to our
25 products, that is a scientifically valid approach.

7915

1 In today's world the mouse skin painting assay is
2 hardly favored by any scientific --

3 Q. Well, let's stick to where we are.

We're

4 moving up through time. I know it takes time, but
5 we're going to do it, so let's not jump to
"today's
6 world." We'll get there. Believe me.
7 But my question is, if it was so widely
8 known, why did you do it if you already knew what
9 the answer was?
10 A. Yes. But in trying to better understand
11 the nature of the assay and what the results
12 mean --
13 Q. All right.
14 A. -- one does this kind of exercise. We
15 still do this kind of exercise.
16 Q. In that study all mouse -- All right.
17 "The exception was the smoke condensate from
18 cigarettes containing only Burley tobacco. The
19 cigarette had a cellulose acetate filter and was
20 heavily flavored with pipe flavors and was" -- I'm
21 sorry. Can't read it. Something "lactic" and --
22 A. Lactic acid.
23 Q. Lactic acid. "Said to reduce the
24 harshness of the Burley tobacco."
25 So evidently there was a kind of tobacco
7916
1 that you found in this test that did better on
this
2 particular test, fair?
3 A. Absolutely correct.
4 Q. All right. And incidentally the
5 Marlboros that you were putting out during this
6 time, did they have this -- the tobacco that
failed
7 the test or pass the test?
8 A. Marlboro -- One of the great
9 characteristics of Marlboro -- and I'm not saying
10 it's because of this -- it has a lot of Burley in
11 it. But I think to look at this and try to
12 generalize to what's going on in the cigarette is
a
13 big -- a big mistake.
14 Q. We're not doing anything but asking
15 questions.
16 A. Marlboro has -- Marlboro has Burley in
17 it.
18 Q. Well, I'll ask you about how Marlboro
did
19 on the test in a little bit when we get there.
20 Okay. "I suggest that strong
21 consideration be given to publishing the results
of
22 the test, identifying the cigarette as an
23 all-Burley product. If Philip Morris could
24 currently introduce a brand with all-Burley
25 tobacco, I believe that our marketing people could
7917
1 develop a major brand overnight." So does
2 that -- Is that what the company's idea was
3 to -- to do these tests in secret, and then if
they
4 could come out with some brands, to publicize it
5 and say it was healthier?
6 A. One could characterize this as
7 secret -- I don't understand what that means.

They

the

8 did -- They did the study. They didn't publish
9 study. And anybody who's ever tried to smoke a
10 Burley cigarette, I think you wouldn't get beyond
11 one puff.

12 Q. I don't know anything about that,
13 but -- Excuse me. Let me ask you, then, why did
14 the author here suggest that they publish the
15 study?

16 A. I think, as a scientist within R&D, I
17 think Bob Carpenter probably felt this was
18 something of interest.

19 Q. So why didn't they publish it?

20 A. I don't know why they didn't publish
21 this.

22 Q. Okay. Now, you say that it was widely
23 known that mouse skin painting was -- at this time
24 was yielding results which showed that commercial
25 products were causing cancer in these laboratory

7918

1 animals, correct?

2 A. I did not say that.

3 Q. Well, do you say it now?

4 A. Do I say what?

5 Q. Was it widely known that commercial
6 products were causing cancer in this laboratory
7 test as of this time?

8 A. I believe it was widely accepted that
9 they probably did. "Known" and "accepted" --

maybe

10 that's -- we're saying the same thing.

11 Q. Did the company publicly state on the
12 record that it had tested its products using this
13 mouse skin painting and that they were causing
14 cancer?

15 A. As I said, the company has published

data

16 on the use of the mouse skin painting to test some
17 ingredients, and that data was both published and
18 submitted to public health authority.

19 Q. Well, now you're jumping ahead, and
20 you're talking also about the Kentucky reference
21 cigarette and all that, right?

22 A. They used the Kentucky reference
23 cigarette, yes.

24 Q. I'm talking about cigarettes that people
25 smoke, the ones that you call Marlboro and

Marlboro

7919

1 Lights, Virginia Slims, those things that you
2 make. Was it known in the mid-60s that when those
3 products were tested with mouse skin painting that
4 they caused cancers?

5 A. As far as I know, as I've said several
6 times, that the commercial products were not
7 tested. But, as I said earlier to one of
8 Mr. Hardy's questions, that the biological

activity

9 of the cigarette is related to the tobacco. Both
10 the Kentucky reference cigarette and our

commercial

11 products, including Marlboro, have tobacco.

12 So if reference cigarettes -- the
13 condensate from reference cigarettes produce
cancer
14 on the backs of mice, there's no reason to believe
15 the condensate from Marlboros would not -- would
16 do -- they would do exactly the same thing.
17 Q. Well, are you saying that all commercial
18 cigarettes are going to do -- are all going to
fail
19 to the same degree, produce all the same amount of
20 cancer?
21 A. I would say given the nature of the
mouse
22 skin painting tests, that all commercial
cigarettes
23 would produce similar -- similar -- very
24 similar-type results, yes.
25 Q. And so if a product is marketed as a
7920
1 superior product based on health, that would at
2 least not be something that would be supportable
3 through this test?
4 A. That would be making the assumption that
5 what you're observing in painting condensate on
the
6 backs of mice somehow reflected what a consumer
who
7 smoked the product might be getting.
8 Q. Well, was this -- And I don't want to
9 belabor skin painting because we're going to go on
10 to some other tests. But, as of this time, is it
11 true that skin painting was accepted as the
12 critical test for the biological activity in
13 cigarette smoke?
14 A. Not by Philip Morris.
15 Q. Okay. Let me hand you this document,
16 please.
17 Okay. All right. Have you seen this
18 document? This is --
19 A. Well, if I could have just a moment to
20 look at it?
21 Q. Sure. I just have to fill the void with
22 my question while you're looking.
23 All right. Can I ask you just a few
24 basic questions while you're looking?
25 A. Yes, sir.
7921
1 Q. All right. This is from Helmut Wakeham
2 which was in charge of R&D at Philip Morris,
right?
3 A. Yes, sir.
4 Q. This is dated September 9th, 1969. It's
5 from Mr. C. H. Goldsmith who was in management,
6 correct?
7 A. Yes, sir.
8 Q. This is about the mouse skin painting
9 that was done. Actually this was a discussion of
10 the mouse skin painting done in England, correct?
11 A. Yes, sir.
12 Q. And does Dr. Wakeham make certain
remarks
13 about the validity or invalidity of mouse skin
14 painting in this document?

15 A. He describes in a reasonably factual way
16 the results of that study.
17 MR. WILNER: Okay. Move it in next
18 number.
19 THE WITNESS: I'm sorry?
20 MR. WILNER: I'm sorry. I asked -- I
21 moved that the document be admitted as the
22 next-numbered exhibit. Pardon me.
23 MR. HARDY: No objection.
24 THE COURT: Any objection?
25 MR. HARDY: No objection, Your Honor.
7922
1 THE COURT: All right.
2 (Whereupon, Exhibit Number 385 was
marked
3 for identification and admitted into evidence.)
4 Q. BY MR. WILNER: All right. Let me
direct
5 your attention to the bottom of page 1. Does it
6 say --
7 MR. WILNER: And, Ms. Stieger, move it
up
8 just a little.
9 Q. BY MR. WILNER: "The mouse skin painting
10 carcinogenicity test" -- What does that word
11 "carcinogenicity" mean?
12 A. Causes cancer.
13 Q. "Despite all of its shortcomings is
14 widely accepted as the critical test for
biological
15 activity of cigarette smoke." Did you say that
16 wasn't accepted by Philip Morris? I thought you
17 said it wasn't.
18 A. No. That is a statement of fact. And
if
19 you -- if you read on --
20 Q. Well, wait. I will read on. You can
21 trust me about that. But first I'm just trying to
22 get this straight. Did you tell me just five
23 minutes ago that Philip Morris did not accept it
at
24 that time?
25 A. Did not accept the validity of this
test,
7923
1 yes.
2 Q. All right. So this is Wakeham saying
3 that it is widely accepted as the critical test
for
4 biological activity?
5 A. Again, let's read the sentence that
comes
6 right above that. "Despite all of its
7 shortcomings" --
8 Q. Yeah. We read that, didn't we?
9 A. Yes, we did. And in there is a very
10 important consideration. What's going on
11 here -- This is the only test that's ever been
done
12 that demonstrates that some part of smoke, and
it's
13 not all of smoke, causes cancer in animals. As
you

14 said, it's the wrong -- wrong target organ, wrong
15 dose and a bunch of other things.
16 Q. I didn't say that, sir.
17 A. Yes, you did.
18 Q. Your spokesman said that. Let's go on.
19 "It's widely accepted as a critical test
20 for biological activity in cigarette smoke. Even
21 the tobacco industry is now hung on this one
22 because of its acceptance of this test in the
23 Chemasol evaluation," right?
24 A. Yes, sir.
25 Q. You know about that?

7924

1 A. I have some recollection of that.
2 Q. Well, that was an additive that was
3 tested, that the cigarette industry wanted to use,
4 and they tested it. And when they tested it, they
5 turned to this test. Remember?
6 A. Yes.
7 Q. And, in fact, we already saw this
8 unpublished material two years ago Philip Morris
9 was using this test, right?
10 A. Yes.
11 Q. Okay. "The Tobacco Working Group of the
12 National Cancer Institute is also using this test
13 as the primary assay of smoke." Do you see that?
14 A. Absolutely.
15 Q. Was it true?
16 A. Yes. Mr. Wakeham was a part of that
17 group.
18 Q. Next?
19 "The conclusion from all this is
20 inescapable. We should start testing our products
21 now because it will be two years before we know

the

22 answer."
23 Now, you mean you weren't testing your
24 products as of 1969?
25 A. In the mouse skin painting?

7925

1 Q. Well, what is he talking about here?
2 A. He's talking about mouse skin painting.
3 Q. Yeah. So he says, "We should start
4 testing our products now"?
5 A. Yes.
6 Q. Well, you weren't doing it evidently,
7 were you?
8 A. In the mouse skin painting? No.
9 Q. "Because it will be two years before"
10 you -- "we know the answer." And what answer was
11 he looking for?
12 A. Whatever answer the results gave.
13 Q. You mean, does it flunk the test?
14 A. If that's what the results are, yes.
15 Q. And did you test the commercial product
16 to find out the answer?
17 A. Where does he say testing the commercial
18 product?
19 Q. I asked you a question if you -- if you
20 tested the commercial product.
21 A. And I've said at least three times we do
22 not do biological tests on commercial products.
23 Q. All right. So when Helmut Wakeham said

24 "We should start testing our products now," do you
25 understand that to mean -- what does he mean by

7926

1 "our products"?

2 A. I would have assumed he meant a
cigarette
3 design change using the reference cigarette. But
I
4 can't answer for Dr. Wakeham.

5 Q. Well, let me just see if I get this
6 straight. You think that when he says "our
7 products" that he's talking about some reference
8 cigarette or he's talking about the products that
9 they sell and charge people for?

10 A. I don't know what he's thinking about in
11 1969. I'm just making an assumption. Maybe I
12 shouldn't.

13 Q. All right. So if Helmut Wakeham said
"We
14 should start testing our products now because it
15 will be two years before we get any answer," your
16 testimony is that Philip Morris never tested its
17 products?

18 A. As I said before, biological testing of
19 commercial products is something that never
20 happened. We tested our products using the
21 reference -- the reference cigarette.

22 MR. WILNER: Your Honor --

23 THE COURT: I think this is an
24 appropriate time.

25 Let me also ask this in the interest of
7927

1 moving things along. Tomorrow when we're here,
2 Mr. Wilner, if you and Mr. Hardy -- and this is
3 certainly not excluding any of the other
4 lawyers -- will meet sometime this evening for an
5 hour or whatever time it takes so that you will
6 produce to him any additional documents that you
7 intend to use during this cross-examination, and
8 you all can then discuss those with regard -- to
9 the extent to which there's agreement as to their
10 admissibility. And as to those matters on which
11 there may not be agreement, we can take those up
12 tomorrow morning. So I'm going to ask that you
13 lawyers meet this evening and do that.

14 MR. WILNER: Yes, Your Honor.

15 THE COURT: All right. We're going to
go
16 ahead now, Sheriff, and adjourn until tomorrow
17 morning.

18 (Whereupon, the jurors were excused from
19 the courtroom.)

20 (Whereupon, Exhibit Number 386 was
marked
21 for identification.)
22 (Whereupon, the evening recess ensued at
23 4:30 p.m.)
24
25

7928

1 COURT REPORTER'S CERTIFICATE

2 STATE OF TENNESSEE:

3 COUNTY OF SHELBY:

4 I, LORI-ANN MASON, RPR, do hereby certify:
5 1. The foregoing transcript of proceedings
6 was taken before me at the time and place stated
in
7 the foregoing styled cause with the appearances as
8 noted;
9 2. Being a Court Reporter, I then reported
10 the transcript of proceedings in Stenotype to the
11 best of my skill and ability, and the foregoing
12 pages contain a full, true and correct transcript
13 of my said Stenotype notes then and there taken;
14 3. I am not in the employ of and am not
15 related to any of the parties or their counsel,
and
16 I have no interest in the matter involved.
17
18
19

Lori-Ann Mason, RPR
Notary Public at Large
State of Tennessee

21
22 My commission expires:
23 August 29, 2001
24
25

7929

1 INDEX OF PROCEEDINGS
2

3 April 20, 1999
4 (Afternoon Session)
5
6
7

8 WITNESS: PAGE
9 RICHARD ALLAN CARCHMAN, Ph.D.

10
11 DIRECT EXAMINATION (Cont'd.)
12 BY MR. HARDY.....

7733

13
14 CROSS-EXAMINATION
15 BY MR. WILNER.....

7740

7930

1
2 E X H I B I T S
3
4

5 EXHIBIT NUMBER PAGE
6
7 Exhibit Number 379 was marked for
8 identification.....

7735 9 Exhibit Number 380 was marked for
10 identification.....
7736 11 Exhibits Number 371 through 381 were admitted
12 into evidence.....
7739 13 Exhibit Number 382 was marked for
14 identification and admitted into evidence.....
7756 15 Exhibit Number 383 was marked for
16 identification.....
7792 17 Exhibit Number 384 was marked for
18 identification and admitted into evidence.....
7813 19 Exhibit Number 385 was marked for
20 identification and admitted into evidence.....
7822 21 Exhibit Number 386 was marked for
22 identification.....
7827 23
24
25